84-569

No.

Office - Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS
CLERK

In The
Supreme Court of the United States

October Term, 1984

CENTURY AIR FREIGHT, INC.,

Petitioner,

-vs.-

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was it proper for the Court of Appeals to affirm the holding of the District Court herein that §404 of the Civil Aviation Act; 49 U.S.C. §1374, mandating a duty on airline operators to furnish air transportation to those making reasonable request therefor and prohibiting undue preferencing and unjust discrimination in air transportation, was not intended by Congress, and therefore never did imply a right of action by private parties to recover for executed acts of misconduct violative of §404 of the Act?

That holding effectively overrules *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956) which found that §404 implied such a right since the Civil Aeronautics Board was powerless to grant reparation in money for past misconduct, and that to deny such right of suit to injured parties in those instances would render §404 unenforceable. Until the instant ruling, *Fitzgerald* was followed without dissent in scores of cases in all Circuits. And now the shipping public, despite §1002(k) of the Act; 49 U.S.C. §1482(k), enacted November 9, 1977 for the era of deregulation and expressly prescribing common carriage and therefore public service as the regime for the air transportation of goods, has been abruptly deprived of the right of enforcement which it had enjoyed for close to 30 years.

2. Could the district court, before the filing of an answer responsive to the complaint, validly dismiss, as presenting no triable issue, a complaint charging violation by an airline operator of section 404 of the Civil Aviation Act of 1958; 49 U.S.C. §1374, and sections 1 and 2 of the Sherman Antitrust Act; 15 U.S.C.

§§ 1 and 2, where a concededly tótal denial, sustained from 1971 to 1977, of access of petitioner's containerized goods aboard respondent's Flight 841—the only daily, fully containerized all-freight, overnight flight from metropolitan New York to Puerto Rico—was matched by respondent's grant to an air freight forwarder competitor of petitioner of an allocation of space aboard the flight of never less than two-thirds of the aircraft's container capacity?

The dismissal disregards the conclusion of the investigatory and enforcing Bureau of the Civil Aeronautics Board, in the course of its exercise of primary jurisdiction of the case and after investigation, that respondent had violated section 404 of the Aviation Act and section 1 of the Sherman Antitrust Act.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984
No.

CENTURY AIR FREIGHT, INC.,
Petitioner,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit herein of July 10, 1984 denying petitioner's petition for rehearing, and of May 31, 1984 summarily affirming the judgment of the United States District Court for the Southern District of New York herein of January 10, 1984 on the opinion, dated January 5, 1984, of the District Court Judge.

OPINIONS BELOW

The Court of Appeals Order of July 10, 1984, denying petitioner's petition for rehearing, is unpublished and a notation thereof has not yet been reported.

The summary Order of the Court of Appeals herein of May 31, 1984 affirming the District Court Judgment of January 10, 1984 on the District Court opinion of January 5, 1984 is unpublished except for a

notation thereof in 738 F. 2d 418.

The opinion herein of the United States District Court for the Southern District of New York, per Hon. Charles L. Brieant, has not been published. It is found in the District Court file of the case under case number 1977 Civil 2195 (CLB).

JURISDICTION

The orders of the Court of Appeals are dated as filed, *viz.*, for the Order denying petitioner's petition for reargument, July 10, 1984; for the summary Order of affirmance on the district court opinion below, May 31, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal law, abandoning and overruling its adherence to an implied right of private suit to enforce, by money reparation, past acts of misconduct by airline operators violative of §404 of the Civil Aviation Act of 1958, as amended, and, holding instead that §404 was neither intended nor allows private suit thereunder. In doing so, it has brought the Second Circuit into conflict with every other Circuit on those questions.

These important questions of federal law have not been but should, especially in the era of aviation deregulation and the demise of the Civil Aeronautics Board, be settled by this Court.

STATUTES WHICH THE CASE INVOLVES

"*§404. Rates for carriage of persons and property; duty to provide service, rates, and divisions; foreign air transportation rates; discrimination*

(a)(1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations and practices relating to such air transportation; and, in case of joint rates, fares charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

(2) It shall be the duty of every air carrier and foreign air carrier to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to foreign air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers and foreign air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers or foreign air carriers.

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Pub. L. 85-726, Title IV, §404, Aug. 23, 1958, 72 Stat. 760; Publ. L. 92-259, §1, Mar. 22, 1972, 86 Stat. 95.

1978 amendment of §404(a)(1) of the Act

"§404. Rates for carriage of persons and property; duty to provide service, rates, and divisions; foreign air transportation rates; discrimination

(a)(1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in schedule air transportation by certificate or by exepton under section 416(b)(3) of this title; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation, and, in case of such joint rates, fares and charges, to establish just, reasonable and equitable divisions thereof as between air carriers participating therein which shall

not unduly prefer or prejudice any such participating air carriers." As amended Pub.L. 95-504, §23, Oct. 24, 1978, 92 Stat. 1724.

Aviation Act, §1002(k); 49 U.S.C. 1482(k)

§1002(k) Definitions

"(k) (1) For purposes of this section, the term 'interstate air transportation of property' means—

(A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia (other than the carriage by aircraft of property by a common carrier between any pair of points both of which are within the State of Alaska or Hawaii if such carriage is part of the continuous carriage of such property and another common carrier provides, as part of such continuous carriage, the carriage by aircraft of such property between any pair of points one of which is within the State of Alaska or Hawaii and the other of which is not with the same State); or between places in the same State of the United States (other than the State of Alaska or Hawaii) through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(B) the carriage by aircraft of property as a common carrier for compensation or hire, in commerce between a place in any State of the United States or the District of Columbia and any place

in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico and a place in the Virgin Islands;

whether such commerce moves wholly by aircraft or partly by other forms of transportation.

(2) For purposes of this section, the term 'overseas air transportation' means—

(A) the carriage by aircraft of persons as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and any place in a territory or possession of the United States; or between a place in a territory or possession of the United States, and a place in any other territory or possession of the United States;

(B) the carriage by aircraft of property as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and any place in a territory or possession of the United States, or the District of Columbia, and any place in a territory or possession of the United States (other than the Commonwealth of Puerto Rico and the Virgin Islands); or between a place in a territory or possession of the United States (other than the Commonwealth of Puerto Rico and the Virgin Islands);

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(3) For purposes of this section, the term 'air transportation of property within the State of Alaska' means the carriage by aircraft of property (A) by a common carrier for compensation or hire in commerce between any pair of points both of which are in the State of Alaska if such carriage is part of the continuous carriage of such property and another common carrier provides, as part of such continuous carriage, the carriage by aircraft of such property between any pair of points one of which is within the State of Alaska and the other of which is not within such State, or (B) by a common carrier for compensation or hire in commerce between places in the State of Alaska through the airspace over any place outside thereof, whether such commerce moves wholly by aircraft or partly by other forms of transportation.

(4) For purposes of this section, the term 'air transportation of property within the State of Hawaii' means the carriage by aircraft of property (A) by a common carrier for compensation or hire in commerce between any pair of points both of which are within the State of Hawaii and the other of which is not within such State, or (B) by a common carrier for compensation or hire in commerce between places in the State of Hawaii through the airspace over any place outside thereof, whether such commerce moves wholly by aircraft or party by aircraft and partly by other forms of transportation." As amended Pub.L. 95-163, §§10(b), 18(a)-(e)(1), Nov. 9, 1977, 91 Stat. 1282,1286,1287; Pub.L. 95-504, §37(a),(b), Oct. 24, 1978, 92 Stat. 1741,1742.

Sherman Antitrust Act of 1890, as amended

Section 1; 15 U.S.C. §1

"*§1. Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contact or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2; 15 U.S.C. §2

"2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreighn nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the disretion of the court."

As amended Dec. 21, 1974, Pub.L. 93-528, §3,88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, §2,89 Stat. 801.

STATEMENT OF THE CASE

Paramount in this case is the fact that the District Court opinion herein (Appendix 4) as summarily affirmed and validated by the Court of Appeals (la,3a)*, effectively and without warrant in law, destroys the decades old right of shippers to sue under section 404 of the Aviation Act; 49 U.S.C. §1374, for reparation of executed and completed illegally discriminatory acts of carriers in air transportation. That destruction of a hitherto existing right puts the remediation of the prohibited misconduct beyond reach, renders the Congressional mandate unenforceable, and constitutes an invitation to the predator since, once the prohibited act is done, the misconduct cannot be remedied.

Palpably this application involves a question of great public importance lying at the very heart of deregulation, namely, whether civil aviation shall continue as a public service industry bound by enforceable rules of fair play in common carriage as required by §1002(k) of the Airline Deregulation Act; 49 U.S.C. §1482(k), or, abandoning the impartial role of public transportation, be allowed to deal individually and on different terms with its customers, to prefer or to exclude. That decision, we feel, is for Congress to make and not for the Courts or for administrative agencies which are charged with enforcing the law as it is, and not with their notions of what it ought to be.

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*References are to pages of the appendices hereto.

Up to very recently it has been a commonplace of the law since 1956 that persons—passengers and shippers—who are the beneficiaries of statutes prohibiting discrimination in air transportation, may sue in the district court to obtain reparation for past, executed acts of carrier misconduct violative of those rights. In its origins of judicial implication of such a right, the reasons for the rule are simple and were thought compelling, *viz.*, the Civil Aeronautics Board ("CAB"), unlike other transportation regulatory agencies, never was and still is not empowered to award money damages. Its regulatory powers were addressed to the future and its armory was the equitable range expressed in cease and desist orders. Therefore, it was reasoned, private suit for violations already executed was the only way to render the statutory prohibition enforceable, else the statute would be stultified and instead of serving as a protection for its beneficiaries, would be an open invitation to the predator.

But now—with the substantive regulation still in force and unabated—the Court of Appeals has agreed with the District Court that the 28-year-old implied statutory right to sue for discriminatory carrier misconduct in air transportation was a mistake; Congress never intended, and consequently there never was, a right of suit by injured beneficiaries to enforce the antidiscriminatory features of the Act:

> "*** this Court concludes that Congress intended no private right of action for a violation of §404.
>
> * * * *
>
> "*** Indeed, there is nothing in the legislative history of either §404(a) or §404(b) indicating Congressional intent to give *any* private

party a right of action." (District Court opinion, 15a, emphasis the Court's).

The implications of this holding, now affirmed, are awesome. *Every* beneficiary of the stautory prohibition against discrimination in air transportation, *all* shippers of air freight, have now had their rights of entitlement to the protection of their statutory rights against discrimination in air transportation destroyed; if they are denied access, if they are squeezed for discriminatory rates, if their competitors are charged less for the same service, there simply is no recourse for what has been done even though the law prohibiting the practices is alive and unrepealed on the books. And even where, as here, the CAB has investigated the absolute embargo by American Airlines, Inc. ("American") of every container of petitioner's ("Century's") goods tendered for the overnight freighter from New York to San Juan from 1971 until September 1977, expressed the view that American violated both the antitrust laws and the Aviation Act, and issued its administrative complaint charging American with violation of §404 (b) of the Act thus instituting an Enforcement Proceeding, that still has not, thanks to the judicial determinations below, given Century any right of judicial recourse or any remediation for that matter for the damage of the six year boycott explicitly prohibited by §404 (a) of the Act. Neither, for that matter and under the reasoning there upheld, would a complete litigating victory in the CAB have accomplished as much for Century.

Effectively and silently, the action of the District Court opinion, and its affirmance by the Court of Appeals, works a judicial repeal of section 1002 (k) of the Act; 49 U.S.C. §1482 (k) thus frustrating a Congres-

sional purpose to fix a regime of common carriage and public service in the transportation of freight by air for the era of deregulation. The decision here is indeed revolutionary. It is also regressive and presumptuously usurps the function and jurisdiction of Congress.

CENTURY'S CASE AGAINST AMERICAN

In May 1977 Century brought suit in the United States District Court for the Southern District of New York. Claiming under both the Sherman Act, secs. 1 and 2, and sec. 404 of the Aviation Act; 49 U.S.C. §1374, the complaint alleged that, early in March 1971, American, which had acquired its New York-San Juan route from Trans Caribbean Airways, for which Century's principals had been the contract local trucker, started up a large capacity, fully containerized, all-freighter flight scheduled for weekday, daily, prime time (overnight) service from New York to San Juan, thus affording the only large volume facility for effecting "next day" service in the New York to San Juan route, i.e., goods picked up in the New York service area during the day could be containerized that evening and flown to San Juan where it would be broken out of consolidation and delivered to consignees throughout Puerto Rico the next day. Profit By Air, Inc. ("PBA"), a recently started air freight forwarder which had built up custom through customer contacts furnished by Century's principals as truckers, quickly established primacy aboard that flight and never had less than two-thirds allocation of the container space aboard the American flight throughout its ten year duration. Both American and PBA feared the capability of Century to divert business away from them; PBA, as "confidential" in-

formant of calumny, succeeded in delaying Century's licensure by the CAB as an air freight forwarder from February 1970 until June 1971. Becoming operative in 1971, Century constantly requested container space aboard the flight and was never allowed to load as much as a single container of its consolidations aboard the flight until September 1977, four months *after* the start of this district court suit, when it was granted a daily one-container allocation on the flight with the proviso that American could break Centurys goods out of containerization. Up until then, in turning down Century's requests, American had claimed that, with twelve main deck container positions, it was full. But the single container allocation to Century disturbed no existing allocations; it was thirteenth to the others' twelve and so continued for the balance of the flight's existence. It was, of course, physically available from the very beginnng, and American's will, rather than any physical inability to accommodate, was what kept Century off the flight during the boycott.

At that time, September 1977, section 404 (a) of the Act was in full force and effect, enacted in 1938, reenacted in 1958, and again to be reenacted in the Airline Deregulation Act of October 24, 1978, 92 Stat. 1724, it read as it always has:

> "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor***."

So, too, was section 404 (b) of the Act in full force and effect from 1938 through reenactment in 1958 and continuing thereafter to the present day. It was this

subsection which, until this case, was authoritatively thought to provide the procedural vehicle for suit by the aggrieved victims of discrimination in air transportation:

> "(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Also in full force and unquestioned at that time as binding authority was *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956) and *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), *cert. denied*, 393 U.S. 846, Lumbard, Ch. J., saying in *Allied* at 449:

> "In this case two causes of action are pleaded. The first relates to violation of the Sherman and Clayton Acts. The second is a tort action for single damages arising out of alleged violations of §404 of the Federal Aviation Act by appellee's discriminating against appellant. In Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) we held that the Board does not have primary jurisdiction over damage actions for past discrimination in violation of §404. There is no cause of action under the Federal Aviation Act which must be referred to the Board for determination."

But when suit was brought in May 1977, the boycott was still total and underway, destined to run its course for another four months. Century's District Court complaint had therefore, in addition to money damages prayed for a Clayton Act injunction to pry American open. American moved for dismissal or stay on primary jurisdiction grounds and, Century consenting, the CAB elected to take the case and the District Court stayed the action pending CAB disposition of the matter.

THE CASE BEFORE THE CAB

Acquiring primary jurisdiction of the case on October 27, 1977, the CAB's investigatory and prosecuting Bureau, after investigation, concluded by June 22, 1979 that American had violated both antitrust laws and the Aviation Act (Appendix 5):

> "We have also concluded, on the basis of information presently available, that there are reasonable grounds to believe that American's practice constituted a violation of Section 1 of the Sherman Act. Specifically, we find that it is inconsistent with the "essential facility" doctrine perhaps best enunciated in *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). The relevant market at issue here is confirmed air freight traveling from New York City to San Juan, Puerto Rico on regularly scheduled cargo service. American's service constituted a facility essential to successful operations in this market. Since, as a practical matter, air freight forwarders are unlikely to be able to duplicate these services, they should be allocated on fair terms. Therefore, in foreclosing the use of American's services, both American and Profit-By-Air may have violated

the antitrust laws. *Hecht, supra*, 570 F.2d at 992; *see also, Otter Tail Power Co. v. Uniter States*, 410 U.S. 366 (1972). By implication, any such violations would also constitute unfair methods of trade within the meaning of Section 411 of the Federal Aviation Act. See, *Federal Trade Commisssion v. Cement Institute*, 333 U.S. 683 (1948)."

CONCLUSION

"For the reasons stated above, the Bureau has concluded that American violated Section 404(b) of the Federal Aviation Act in excluding Century from its New York City-San Juan freighter service and by continuing to restrict the availability of this service as a result of preferences given other forwarders. These actions not only injured Century's business, but also caused great harm to the general public. American prevented a small forwarder from offering new, innovative service to the public in competition with the incumbent. Such a result is directly contrary to the aims of deregulation and current Board policies." (39a-40a)

On December 14, 1979 the CAB enforcement Bureau initiated a CAB Enforcement Proceeding against American and issued its administrative complaint charging it with violation of section 404(b) of the Act in its exclusion of Century from the flight despite Century's many requests for such air transportation service, and seeking an order which would require American to make equitable allocation of container space aboard the flight with provisions for regular periodic revisions.

When the case arrived at the CAB on October 27, 1977, it came at the very threshold of deregulation. Less than two weeks later, the legislation of November 9, 1977 establishing a year of preparation for the effectuation of deregulation was enacted—P.L. 95-113. From that outset, it made it plain that the deregulated basis for the carriage of air freight would be a public service industry with transportation services performed by common carriers. Thus the newly enacted §1002(k); 49 U.S.C. §1482(k):

> "*** the term 'interstate air transportation of property' means—
>
> (A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce ***
>
> (B) the carriage by aircraft of property as a common carrier for compensation or hire, in commerce between a place in any State of the United States or the District of Columbia and any place in the Commonwealth of Puerto Rico ****"

And when a year later on November 9, 1978, the CAB, acting with respect to *domestic* air carriage of goods, exempted it from the duty to carry under §404(a), it made plain how far the strictures of common carriage limited the actual operation of that exemption:

> "The Board is also exempting carriers in domestic cargo transportation from the duty under section 404(a) of the Act to carry on reasonable request ****.
>
> This exemption, however, does not relieve the carriers of their service obligations as common carriers, and does not apply to a carrier's duty to refrain from providing preferential treatment to particular companies or persons. Carriers holding certificates under section 401 or 418 of the Act remain, by definition,

common carriers. The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption, therefore, only ends the Board's role in regulating the extent of the carriers' service offerings, ***" (General Rules for All-Cargo Carriers, ER-1080; 43 Fed. Reg. 53628; 53631, November 16, 1978)

Ironically, it was passengers—the travelling public—who were withdrawn from the coverage of sections 404(a) and 404(b), and who never had coverage under §1002(k) of the Act, who no longer may maintain a private suit under 404(b) of the Act. That was not the doing of a Court nor an administrative body. Thus in 49 U.S.C. §1551(a)(1)(F) passengers in both interstate and overseas air transportation ceased to have a right to require an air carrier to furnish air transportation under sec. 404(a) as of December 31, 1981; and under subsection (a)(2)(B) they ceased to have any right in section 404 altogether, save for the 404(a) right to be provided safe and adequate service, as of January 1, 1983. Thus Congress has dramatically mandated the status and effect of its statutes, *viz.*, section 404(a) and (b), as well as 1002(k), of the Act function and exist for the benefit of *shippers* in air transportation; they are not to be excluded by some court's *obiter* supposing an exclusivity of benefit for the "travelling public." As to the rights of shippers by air, even to the extent of the limited exemption for section 404(a)'s duty to carry on reasonable request affecting domestic air transportation of goods, and putting out of mind that American's termination of its six year embargo in September 1977 a full fourteen months *before* the November 9, 1978 exemption from the duty to carry, came far too early for American to have its embargo legitimated, the prosecuting

Bureau's trial brief is sobering:

"The Supreme Court recently held that one of the fundamental principles defining the obligations of a common carrier is to provide a 'nondiscriminatory right of access' to all who seek to use its service. *FCC v. Midwest Video Corp.*, 99 S.Ct. 1435, 1442-43, [440 U.S. 689] (1979). This general principle is reflected in the proscription against unjust discrimination contained in section 404(b) of the Federal Aviation Act. Section 404(b), in the words of a leading case:

> " 'precludes different treatment of like traffic for like and contemporaneous service under substantially similar circumstances and conditions. (Citations omitted) Such discrimination may result from the charging of different rates to different *shippers* or passengers offered the same service . . . or from the offering of specific services to only a select patron or group of patrons. (Citation omitted) In either situation, the result is that the carrier is giving preferential treatment to one person or group of persons to the prejudice of another and contrary to the requirement that all those who seek the service of a carrier must be treated alike.' *Transcontinental Bus System, Inc. v. Civil Aeronautics Board*, 383 F.2d 466 at 481-82 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968)."

"American's practice of granting Profit-By-Air and other favored forwarders allocations of indefinite duration on its New York-San Juan cargo flights, and refusing all others space on the flights is a classic example of the 'offering of specific services to only a select patron or group of patrons.' This practice has resulted in the very harm—to Century and to other forwarders who have requested space on the flights—sought to be prevented by section 404(b), namely, 'giving preferential treatment to one person

or group of persons to the prejudice of another and contrary to the requirement that all those that seek the service of a carrier must be treated alike.' "

The CAB's case against American was settled over Century's litigated objection as giving American too much leeway in the proposed selection or rejection of customer applicants. The Court of Appeals for the District of Columbia Circuit overruled Century's objections to the settlement and dismissed its petition for review, 679 F. 2d 261 (D.C. Cir. 1982), and this was followed by a denial of certiorari, 459 U.S. 943 (1982). However, in its unpublished judgment, the Court of Appeals made plain that some selection of customers on a basis not violative of section 404(b) had been legitimized by the November 9, 1978 exemption of domestic air carriage of goods from the Aviation Act's section 404(a) duty to carry, thereby validating the CAB's settlement with American. It also reiterated the CAB's assurance that nothing in the settlement prejudiced Century's court case. Thus:

"*** The terms of the settlement do not authorize American Airlines to operate an overnight, all-cargo flight between New York and San Juan in violation of Section 404(b) of the Federal Aviation Act, 49 U.S.C. §1374(b). Nor was there error in allowing American Airlines to refuse reasonable requests for service on such a flight. 14 C.F.R. §291.31(a)(2) (1980); *see Nat'l Small Shipments Traffic Conference v. CAB*, 618 F.2d 819, 831-832 (D.C. Cir. 1980). *** We note that the order under review expressly states that it is not intended to prejudice petitioner's pending suit against American, and the order does not state or imply that American's conduct between 1971 and 1981 did not violate the antitrust laws. ***"

The case having been settled on the basis of a

$50,000. civil fine, an annual allocation system, and a practical guarantee of some space for Century aboard the flight—and with the flight itself shortly terminating thereafter, the case came back to the District Court for crossed summary judgment applications, Century's for liability, American's for dismissal. The result, as affirmed, was dismissal A) of the Aviation Act action on the ground Congress never intended a private cause of action under §404 of the Act and that therefore it never legitimately existed. and B) of the Sherman Act treble damage cause on the ground that the unanswered complaint of May 5, 1977 alleging an illegal, unrelentingly total boycott of access of Century's containerized goods aboard American's overnight freighter flight from New York to San Juan, all in favor and preference of Century's forwarder competitor Profit By Air, starting from the almost coincidental beginnings of operations in 1971 down to the time of suit and destined to go on unbroken for another four months until September 1977—could not possibly present a triable antitrust issue in Century's favor.

That result is absurd because it tries to flout the central, immovable and unretrievable feature of the case which is, of course, the illegally monolithic restraint of trade exercised by American over an unbroken six year period of absolute refusal to transport Century's goods, a refusal blatantly violative of a policy statute of the United States imposing on it the duty to furnish transportation, and to abstain from unjust discrimination and the granting of undue preferences.

More than that, the complaint did not come up to the District Court as a newborn on American's mo-

tion; it had been thoroughly investigated by the administrative expert which, far from dismissing it, had started a companionate Enforcement Proceeding against American based on its allegations. The boycott itself was never disputed by American. At first American's position was that its action in preferencing Profit By Air was justified by the necessity for "meeting competition," that fear of losing its star customer Profit By Air to others was the reason for not allocating space to Century. Later, forgetful that Sherman Act, section 2 was still on the books, American decided on the strategy of becoming the sole master of its enterprise. Thus its affidavit on the motions to the District Court:

> "American had no agreement with PBA to exclude Century from Flight No. 841. American's failure to provide Century with a reserved air freight position until 1977 was American's independent business decision dictated by American's economic needs.***"

ARGUMENT

1. *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956) is valid prevailing authority for allowing private suit under Section 404(b) of the Aviation Act by qualified suitors illegally injured by carrier discrimination in air transportation.

What is utterly disheartening here is the Second Circuit's unabashed hostility to the protective purposes of section 404 of the Aviation Act, its cheerful exoneration of American from any wrongdoing in its six year blatantly illegal boycott of Century while ostensibly discharging its public service obligations as a common carrier. Worst of all is the District

Court's deliberate omission to ever mention the vitally operative portion of §404(a) of the Act while purporting to expound it to the reader so that the opening sentence of §404(a) of the Aviation Act

> "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor ***"

appears nowhere in the Court's opinion, and is dropped in what purports to be its exposition of the subsection (13a). Like expounding the Fourteenth Amendment but omitting its section 1, the distortion is enormous. Although the interests of shippers are cheerfully thrown out the window, nowhere can any reference to sec. 1002(k)—mandating a common carrier basis for air transportation of *property*, enacted for deregulation, be found in the opinion. From the beginning of the opinion to the end, the reader will find no trace of *Fitzgerald v. Pan American World Airways*, nor of *Allied Air Freight v. Pan American World Airways*, 393 F.2d 441 (2d Cir. 1968), cert. denied, 393 U.S. 846, even though they are paramount authority for the validity of the Aviation Act features of this suit. Where there is very recent high authority sustaining the enduring authority of long adjudicated cases implying a private remedy, the District Court ridicules and refuses to follow:

> "*** While it is true that the Supreme Court has backslid on one or two such cases recently, notably *Merrill Lynch, etc. v. Curran*, 444 U.S. 356 (1982) and *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) *** 'a lower federal court . . . must employ the analysis *currently* required by the Supreme Court for making the determination of Congressional intent' " (emphasis supplied) (Appendix 4, 15a).

Fitzgerald v. Pan American World Airways, Inc., 229 F. 2d 499 (2d Cir. 1956) is now effectively overruled by the Court of Appeals' summary affirmance of the District Court opinion. Not even mentioned below, not measured by *Cort v. Ash*, 422 U.S. 66 (1975), criteria, nor looked at for *Herman & MacLean v. Huddleston* unchallenged longevity, the shipping public is quietly dropped overboard from the protection of the Act. But *Fitzgerald* is a persuasive exponent for the private remedy it finds implied in §404 of the Act. Speaking of sec. 404(b), then 49 U.S.C. §484(b) in the 1938 enactment, Frank, J. said:

> "*** [§484(b)] is for the benefit of persons, including passengers, using the facilities of air carriers. Consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation. (229 F. 2d at 501)
>
> ****
>
> "Defendant also contends that the sole *** remedy for a violation of any provision of the Act is to be found in *** a complaint to the Civil Aeronautics Boad which must investigate the complaint and, if the facts warrant, must issue an order compelling compliance with the violated provisions of the Act. We cannot agree. As such an order must look to the future, obviously it cannot afford redress to one harmed by a violation of Section 484(b). *** no order of the Board can compel the defendant in 1956 to permit the plaintiffs to board defendant's plane on July 19, 1954.
>
> "This is not a case where the Board has 'exclusive primary jurisdiction': (1) *The Civil Aeronautics Act, unlike the Interstate Commerce Act or the Shipping Act, confers no power on the administrative agency to grant reparation in money for past misconduct of the carrier.* (2) The Board has no power to approve viola-

tions of Section 484(b). (3) Nor has it purported to do so." (emphasis supplied; 229 F. 2d at 502)

Not acknowledging the existence of the mandate of carrier's *duty* to furnish transportation upon reasonable request, the District Court matched nothing against the *Cort* criteria and found them grossly unsatisfied. In the actualities, *Fitzgerald* would fare handsomely as would §404(a):

1. Was enactment for the benefit of a special class?

Answer:—Yes, for the benefit of persons requesting air transportation, i.e., passengers and shippers. "*** in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff *** or a pervasive legislative scheme governing in the relationship between the plaintiff class and the defendant class in a particular regard." 422 U.S. at 82.

2. Congressional intention consistent with right to federal cause of action for damages.

Answer:—"*** 'in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." 422 U.S. at 82. (emphasis the Court's)

3. Consistency of the implied cause of action with the statutory purpose.

Answer:—"*** 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose,' ***" 422 U.S. at 84.

Here *Fitzgerald* is exceptionally apt.

4. Existence of a state law remedy? Answer:—No. This is a *sui generis* federal statutory remedy under sec. 404(b) of the Act to enforce both 404(a) and 404(b).

This is the very first time in the career of *Fitzgerald* as a leading case that it has been challenged, let alone overruled. Even cases thought critical of private suit under the Act have been in accord where the discrimination has been actually in air transportation. Thus *Diefenthal v. C.A.B.*, 681 F. 2d 1039 (5th Cir. 1982), cert. denied, 103 S. Ct. 732 (1983):

> "Section 1374(b) [404(b)] has been recognized to prohibit the granting of preferential and discriminatory rates, the denial of access to flights and terminals on the basis of race and the practice of 'bumping' passengers ***. See *Mason v. Belieu*, 543 F. 2d 215, 219 (D.C. Cir.), cert. den. 429 U.S. 852; *Polansky v. Trans World Airlines*, 523 F. 2d 332, 335-36 (3rd Cir. 1975). In *Polansky*, the Third Circuit recognized, however, that not every difference in treatment by an airline does not constitute discrimination. It found that section 1374(b) was only intended 'to protect the right of access to air facilities from discriminatory interference in treatment by the air carrier. . . . It is this denial of access to air facilities, whether caused directly, or by outright refusal of permission to board, or indirectly, by burdening the potential user with special requirements not applied to the general public, which is critical."

Diefenthal v. C.A.B. makes the rather common mistake of treating *Fitzgerald* as though it were actuated in the interest of combatting racial discrimination: Thus *Diefenthal*, 681 F.2d at 1051, ftn. 13:

> "We do not suggest that either ad hoc intentional racial or similar class-based discrimination, or

discriminatory general airline rules, respecting in-flight service or accommodations should not be the subject of a private cause of action under section 1374(b). The case before us presents nothing of this kind."

The essence of a suit for discriminatory denial of access under section 404(b) is not that the discrimination may have been racially motivated, but that it was, when the statute was available to passengers, a violation of the carrier's duty to furnish transportation under section 404(a). And, under the fourth criterion of *Cort v. Ash*, it was a matter of federal remediation, the State courts having neither the statutory mandate nor the statutory remedy. And *Caceres Agency, Inc. v. Trans World Airways, Inc.*, 594 F. 2d 932 (2d Cir. 1979), though quoted by *Diefenthal* as finding that a private remedy does not exist under section 404, is, in actuality no foe to the authority of *Fitzgerald;* thus *Caceres* at p. 933:

"*** Many years ago, this Court stated that section 404(b) (then section 484(b) of the Civil Aeronautic Act) was for the benefit of persons using the facilities of air carriers. *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499, 501 (2d Cir. 1956); *see also Lichten v. Eastern Airlines, Inc.*, 189 F. 2d 939, 941. What was the the statutory purpose remains the statutory purpose today; it is the protection of the travelling public. ***"

Patently, there is no way to breathe legality into the six year boycott by American of access of Century's goods aboard its flight. That act was a gross violation of its public service obligations under section 404(a) of the Act and, derivatively, an "unjust" discrimination in air transportation under 404(b) of

the Act. To relieve so gross a violation of the Act from adverse consequences to American is subversive of the Act the courts are obliged to enforce. If, as a consequence of relieving American from adverse consequences of its patently illegal boycott, the shipping public has been deprived of all rational remediation for violations of sections 404 and 1002(k) of the Act, an authoritative judicial opinion from this Court is their entitlement. We urge this Court to grant certiorari.

2. The legal predicate of the undisputed exclusion of Century's goods from American's freighter flight sustained for six years is that it was a gross violation of §404 of the Aviation Act and an illegal restraint of trade. In those circumstances, the mere presence of a beneficiary and preferencee made the possibility of antitrust violation too strong to allow summary dismissal on antitrust.

With the boycott itself an uncontested reality and its illegality under section 404 of the Act palpable to a point where it has been deemed necessary to hold that no right of private action exists under the Aviation Act, it is American which has come forward to admit the obvious. Thus in a letter to the CAB of September 18, 1979:

> "*** American's practice of allocating "A" positions in favor of PBA is rooted in the economic necessity of retaining the PBA traffic which no other forwarder can replace and preventing that traffic from going to a charter."

and

> "*** if American were required to give a PBA

position to Century, the result could well be withdrawal of PBA's business and cancellation of the service."

And putting aside the inexcusable illegality of a boycott by a common carrier, *Com-Tel, Inc. v. DuKane Corporation*, 669 F.2d 404 (6th Cir. 1982), instructs us that where the pressure, seemingly vertical, originates, in reality, from the competitor preferenced, that horizontal pressure in itself spells out a violation of antitrust which is, at the very least, a triable issue.

On the affirmative side, it should not be forgotten how completely the Courts below have disregarded the investigatory material, findings and conclusions of the CAB, supposedly the administrative expert exercising its primary jurisdiction upon whose work the courts are supposed, at the very least, to give heed.

CONCLUSION

For the foregoing reasons, petitioner earnestly prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: October 4, 1984

APPENDIX 1—ORDER DENYING PETITION FOR REHEARING IN BANC, JULY 10, 1984

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of July one thousand nine hundred and eighty-four.

CENTURY AIR FREIGHT INC.,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES INC.,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Century Air Freight Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX 2—COURT OF APPEALS' SUMMARY AFFIRMANCE OF DISTRICT COURT JUDGMENT ON OPINION BELOW, MAY 31, 1984

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of May one thousand nine hundred and eighty-four.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE RICHARD J. CARDAMONE,
HONORABLE GEORGE C. PRATT,
Circuit Judges,

CENTURY AIR FREIGHT, INC.,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Docket No. 84-7125

Appeal from a judgment of the United States District Court for the Southern District of New York, Brieant, J.

This matter came on to be heard on the transcript of record from said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, the judgment of the district court is hereby affirmed on the opinion of Judge Brieant below.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

s/ George C. Pratt
George C. Pratt, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX 3—JUDGMENT DISMISSING COMPLAINT, JANUARY 10, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTURY AIR FREIGHT, INC.,
Plaintiff

-against-

AMERICAN AIRLINES, INC.,
Defendant

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77 CIVIL 2195 CLB

Plaintiff having moved for partial summary judgment and defendant having moved for an order dismissing certain claims pleaded and granting summary judgment in its favor with respect to others, and the said motions having come before the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on January 5, 1984, having handed down its memorandum and order denying plaintiff's motion for partial summary judgment in all respects: granting defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) F.R. Civ. P., with respect to the claim under §404 of the Federal Aviation Act; granting defendant's motion for summary judgment against plaintiff as to the claims under Sections 1 and 2 of the Sherman Act; and directing the Clerk of the Court to enter final judgment that all relief is denied, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

s/ Raymond F. Burghardt
Clerk

DATED: NEW YORK, N.Y.
January 10, 1984

APPENDIX 4—DISTRICT COURT OPINION, JANUARY 5, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTURY AIR FREIGHT, INC.,
Plaintiff,

-against-

AMERICAN AIRLINES, INC.,
Defendant.

---

77 Civ. 2195-CLB

Brieant, J.

By motions argued on September 9, 1983 and fully submitted on September 23, 1983, plaintiff seeks partial summary judgment, while defendant seeks an order dismissing certain claims pleaded, and granting summary judgment in its favor with respect to others.

This action was stayed for a time pending application by plaintiff to the Civil Aeronautics Board ("CAB") for administrative relief upon some but not all of the claims. These administrative proceedings have been concluded.[1] There remains for adjudication here Federal Aviation Act claims and antitrust claims pleaded, which were not resolved by the administrative proceedings and subsequent appellate review thereof.

Except where noted, the facts stated below are not controverted, or may be regarded as conceded

solely for purposes of the motions. Defendant American Airlines, Inc. ("American") is a direct air carrier of freight and passengers. Plaintiff Century Air Freight, Inc. ("Century") is a licensed air freight forwarder, authorized to engage in that activity by the CAB, as are many others.

In January 1970, American acquired Trans-Caribbean Airways, and as part of that acquisition assumed its carriage of air freight between New York City and San Juan, Puerto Rico. On March 1, 1971, subsequent to that acquisition, American initiated Flight 841, a weekday all-cargo flight from New York City to San Juan. The dispute herein arises out of the subsequent allocation by American of main deck container positions on that flight.

Affiliated interests of the plaintiff apparently had prior commercial disputes, litigation and arbitration with American totally unrelated to this action or the dispute set forth below. Plaintiff suggests, and we infer, that these disputes left a residue of ill will. In addition, in February 1970, while Century's application for a license from the CAB was pending, the president of a competing licensed air freight forwarder, Profit By-Air, Inc. ("PBA"), wrote a derogatory letter to the CAB concerning plaintiff, referred to as a "devastatingly effective poison pen job on Century Air Freight." Plaintiff's Memorandum at 1. There is no showing that this letter reached American, or that American shares any responsibility for it. Nevertheless, in June 1971 Century's freight forwarding license was granted by the CAB.

American Flight No. 841, during the period of its existence, from March 1, 1971 to August 31, 1981, had

a scheduled departure from New York which varied between 11:00 P.M. and Midnight, with the return flight from San Juan, American Flight No. 840, scheduled for departure in the early morning immediately following discharge of cargo and reloading. The capacity of the Boeing 707 aircraft operated by American on these flights was as follows: (1) eleven, unbroken standard "A" type freight containers on the main deck of the aircraft; (2) the cubic equivalent in the breakbulk form, of one additional "A" type container on the main deck; (3) two specially contoured containers each with the cubic capacity of an "A" type container in the tail section; (4) the cubic equivalent of three "A" type containers of breakbulk cargo in the cargo bay compartments of the aircraft. An "A" type container has a capacity of approximately 5,500 lbs., and contains 440 cubic feet.

American allocated the space for the twelve main deck container positions by a "Confirmed Air Freight" method, whereby there was an understanding between American and various shippers and/or forwarders, to the effect that specific numbers of container positions regularly would be available and be used by them on Flight 841. Recurring daily reservations were offered and maintained, conditional upon continuous use of the amount of space reserved by the shipper. Initially, American made offers in part on the basis of the shipper's demand for container space on the return flight, Flight 840, which was less lucrative because less air cargo moves in that direction.

According to American, the recurring daily reservations were granted initially in March 1971 on a first-come-first-served basis, and such reserved space did

not become fully committed until the end of 1971. By that time, American had allocated eight main deck container positions to PBA, three to Shulman Air Freight, Inc. ("Shulman") and one to Emery Air Freight, Inc. ("Emery"). These allocations were in effect until 1978.

American asserts that on several occasions during 1971, before the main deck container positions were fully reserved, it offered Century confirmed air space on Flight 841, but that Century declined the offers, "apparently because [Century] believed it had preferable [space] from other carriers." (Affidavit of George A. Shipman, sworn to August 10, 1983, par. 11 [Shipman Affidavit"]). Specifically, it is contended that Century contemporaneously held confirmed air freight space for six to eight "LD-3" type container positions on a late night Eastern Airlines combination passenger/freight flight from New York to San Juan. (Shipman Affidavit, par. 13).

American asserts further that Century's requests for specific space on particular dates on Flight 841 were granted or denied solely on the basis of the availability of space on the particular dates requested. It also contends that in January 1973 Century was given a reserved space for one hundred pounds of cargo, and that in September 1977, after the commencement of this action, American accorded Century a recurring reservation for a weight volume allocation on Flight 841 equivalent to one "A" type container. American did not confirm, however, that the Century freight would move in a container rather that as breakbulk cargo. Finally, American asserts that in 1978 when Shulman abandoned its three reserved container positions, these were filled based upon the re-

quests of at least seven shippers, and that the three shippers granted the space has previously been without any reserved space on Flight 841.

Century contests the foregoing interpretation of events, and asserts that from the time it was first licensed as an air freight forwarder in June 1971, American never offered it any main deck container positions on Flight 841, and that in fact Century's repeated requests for reserved space were denied consistently. (Affidavit of Salvatore Cirami, sworn to July 2, 1983, par. 14 ["Cirami Affidavit"]). It asserts further that its constant requests for confirmed space in main deck container positions were prompted by necessity, because Flight 841 was the only daily all cargo flight between New York and San Juan during the relevant time period with reliable next day delivery service. (*Id.* at par. 15).

While Century does not contest directly that it had confirmed space on an Eastern Airlines combination passenger/freight flight, it does contend that the space on alternatives to Flight 841 was commercially unacceptable because the "LD-3" type containers on such combination flights had only one-third the capacity of the "A" type containers used on the American flight, and because the departure times of the alternative flights were "inconvenient" for loading in New York and ultimate delivery in Puerto Rico. (Reply Affidavit of Salvatore Cirami, sworn to August 24, 1983, par. 21). Century also contends that the offer of 100 pounds reserved space, made by American in April 1973 was commercially insignificant, and that the instant litigation was the sole reason for American's September 1977 offer of the equivalent of one "A" type container space.

On the basis of the foregoing facts, Century alleges that American, in conspiracy with PBA, refused, wrongfully, to deal with it with respect to reserved air freight space on Flight 841 in violation of §404 of the Federal Aviation Act, 49 U.S.C. §1374, and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. American responds, as it did in the substantial correspondence between the parties (see Plaintiff's Exhibit 9), that it did not exclude Century from Flight 841 wrongfully, but rather that its reserved space allocation method or system was commercially necessary to assure the continued existence of the flight, and that, therefore, American could not reasonably cancel the existing continuous reservations of PBA, Shulman and Emery solely for the benefit of the plaintiff.

Federal Aviation Act Claim

Century alleges that American's refusal to accord it reserved main deck container positions on Flight 841 violates §404 of the Federal Aviation Act. entitling it to damages on its motion for summary judgment. American, in its motion, seeks to dismiss under Rule 12(b)(6), F.R.Civ.P. so much of the complaint, filed May 5, 1977, as is based on the §404 claim, on the grounds that Century has no implied private right of action for damages under that statute. In addition, in opposing Century's motion for summary judgment, American argues that even if there is an implied right of action under §404, the plaintiff's motion should not be granted because questions of fact remain as to whether (1) American discriminated against Century in assiging reserved space; (2) Century requested reserved air freight under similar circumstances as those who were granted main deck container positions;

(3) the allocation system resulted in any injury to competition in the relevant market; (4) the challenged allocation method was commercially reasonable because necessary to sustain Flight 841; (5) the challenged practice was necessary to meet competition from other direct carriers of air freight between New York and San Juan.

It is unnecessary to consider whether the aforementioned issues of fact are material and genuinely in dispute, because this Court agrees with defendant that an air freight forwarder has no implied private right of action for damages against an air carrier under §404 of the Federal Aviation Act..

Section 404(a)(1) provides in pertinent part that every air carrier has the duty, with respect to interstate and overseas air transportation, to "establish, observe and enforce... just and reasonable classification, rules, regulations, and practices relating to such air transportation." Section 404(b) provides that an air carrier may not make any "unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever" with regard to any person. A fair reading of Century's papers indicates that it premises its complaint and its motion for partial summary judgment upon both of these provisions.

There is no express statutory authority for a private right of action under either of these subdivisions, therefore, the question of whether an implied right of action is appropriate must be considered. American asserts and Century has not disputed, that heretofore no court has ever implied such a right under §404(a). Moreover, defendant contends that no

court has ever implied a right under §404(b) on the part of an air freight forwarder.

Prior to the Supreme Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), a private remedy was readily presumed in favor of one specially injured by the violation of a regulatory statute. However, in *Cort, supra*, such presumptions were rejected, and a four part test was devised to determine whether Congress had actually intended to create a private right of action in favor of the particular plaintiff seeking to assert that right. 422 U.S. at 78. The four factors are (1) whether the plaintiff is a member of a class for whose "especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent to create or deny the remedy sought' (3) whether the implication of the right of action would be consistent with the underlying purposes of the regulatory scheme involved; and (4) whether the cause of action sought is one traditionally reserved to the states. *Id.*

In an effort to cram the genie back into the bottle, and stem the overwhelming flow of federal civil litigation spawned by *J.I. Case v. Borak*, 377 U.S. 426 (1964), which *Cort v. Ash*, did not succeed in doing, this test has been narrowed further in subsequent decisions, which emphasize the need to find affirmative expressions of Congressional intent before implying a right of action. *E.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1,13 (1981) (legislative intent is the "key to the inquiry"); *Touche Ross & Co. v. Redington*, 422 U.S. 560, 568 (1979) (all considerations should be subordinated to the determination of Congressional intent); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979), *quoting Cannon v. University of Chicago*, 441 U.S. 677, 742 (1979)

(Powell, J., dissenting) (the relevant question is whether "Congress absentmindedly forgot to mention an implied private right of action"). See also, *Siebert v. The Conservative Party of New York State*, __F.2d__(2d Cir., December 21, 1983, Dkt. 83-7542). While it is true that the Supreme Court has backslid on one or two such cases recently, notably *Merrill Lynch, etc. v. Curran*, 444 U.S. 356 (1982) and *Herman & MacLean v. Huddleston*, 459 U.S. 375, (1983), *Siebert* makes it clear that "[a] lower federal court... must employ the analysis currently required by the Supreme Court for making the determination of Congressional intent" (slip op. at 705).

Applying such considerations, this Court concludes that Congress intended no private right of action for a violation of §404.

To begin our analysis, we note that Century is not an intended beneficiary of §404. As an air freight forwarder, it is itself a regulated entity under the statute, and therefore cannot claim any "especial benefit." The purpose of the Federal Aviation Act has been defined to be "the protection of the traveling public." *Carceres Agency, Inc. v. Trans World Airways, Inc.*, 594 F.2d 932 (2d Cir. 1979) [travel agent not a beneficiary under §404(b)]. Air freight forwarders, like travel agents, are members of the air transportation industry who arrange for and purchase air transportation for the benefit of the public at large.

In *Carceres, supra*, the Court of Appeals observed that there is no indication in the legislative history of §404(b) that Congress intended to give travel agents a right of action. 594 F.2d at 933-34. Indeed, there is nothing in the legislative history of either §404(a) or

§404(b) indicating Congressional intent to give *any* private party a right of action. See 1958 U.S. Code Cong. & Adm. News 3741-72. Furthermore, a companion provision of the Federal Aviation act, 49 U.S.C. §1487(a) authorizes a private action in the district court to enforce 49 U.S.C. §1371(a), which prohibits persons from engaging in air transportation without a CAB certificate. The only other enforcement provision of the Act, 49 U.S.C. §1487(b), authorizes the CAB or the FAA to initiate proceedings for violations of the Act.

Because Congress has specifically authorized these remedies, an inference follows that there was no Congressional intent to have this Court imply additional remedies. This Court should not alter the legislative design with remedies of its own choosing absent an indication of an intention by Congress that we should do so. *Carceres, supra,* 594 F.2d at 933; *Siebert, supra.*

Also, there has been no showing that the implication of a private right of action in this instance would be consistent with the underlying legislative scheme of the Federal Aviation Act, and I believe it would not be. Damage actions do not inevitable complement the work with which the federal regulatory agencies have been charged by Congress. Indeed, in the context of allegations of economic discrimination or unfair trade practices, the necessary inquiry involving economic and policy considerations is often better suited to resolution by the administrative experts of the agency charged with the supervision of the industry than by the results of many disparate civil lawsuits randomly brought, and just as often randomly decided by different courts throughout the nation.

The absence of any strong need for an implied judicial remedy of damages is also demonstrated by the fact that the CAB has already addressed the issues raised by Century, and American has signed a consent order resolving the question of future air cargo space alocations. A damage action is clearly not necessary to further the purposes of the Act, nor is there any reason to believe it was intended by Congress.

Finally, although the existence of a state common law remedy is said to be irrelevant when other parts of the *Cort* test have not been satisfied, *Touche Ross & Co. v. Redington, supra* at 575-76, it should be noted that Century, unlike the travel agent in *Carceres,* has no damage action under state law.

Accordingly, plaintiff's motion for a partial summary judgment with respect to its §404 claim is denied, and defendant's motion to dismiss the claim is granted because this Court concludes as a matter of law that no implied right of action exists for the claimed violations.

Claim Under §l of the Sherman Act

Century contends that American and PBA consipired to exclude it from Flight 841 in violation of §1 of the Sherman Act. (Complaint, par. 30; Plaintiff's Memorandum at 1). American contends that its motion for summary judgment against Century should be granted on this claim because plaintiff has failed to produce significant probative evidence that American and PBA combined or conspired to prevent access by Century to Flight 841, and because that flight is not the relevant market.

Under §1 of the Sherman Act, Century has the burden of proving that (1) there was concerted activity by American and PBA to exclude Century from Flight 841; and (2) that this concerted activity resulted in an unreasonable restraint of trade in the relevant market. *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 960 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

In its complaint, Century does allege an agreement between American and PBA, and the affidavits and affirmations submitted on this motion present the following evidence in support: (1) that PBA was the beneficiary of American's refusal to provide Century with reserved container positions on Flight 841 (Cirami Affidavit, par. 18; Affirmation of Milton Horowitz, Esq., sworn to July 4, 1983, par. 9 ("Horowitz Affirmation"); (2) that at a prior point in time, PBA informed the CAB that Century would be an "undesirable element" in the air freight forwarding business (Cirami Affidavit, par. 18); Horowitz Affirmation, par. 9); (3) that American's failure to accord Century with reserved container positions was motivated by fear of losing PBA as a customer (Cirami Affidavit, par. 18); (4) that American and PBA had frequent meeting at which Flight 841 wa discussed (Horowitz Affirmation, par. 9).

The proffered evidence, if believed, is insufficient to establish an unlawful conspiracy between American and PBA. While it is of course true that "[i]llegal conspiracies... can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators," *Venture Technology, Inc. v. Natural Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir.), *cert.*

denied, 103 S.Ct. 775 (1982), the plaintiff must nonetheless present evidence of "qualitative value in demonstrating that the parties actually entered into a conspiracy." *Id.* at 48. A showing of close relationships between the alleged conspirators, or frequent meetings between them, without more, will not sustain the plaintiff's burden. *Oreck v. Whirlpool Corp.*, 639 F.2d 75, 79 (en banc) (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981). Moreover, a mere showing that a customer such as PBA had the economic power to affect a supplier, here American, in its dealings with another customer such as Century, does not constitute sufficient circumstantial evidence of an unlawful agreement or conspiracy. *Id.* Nor do the complaints of another customer about the plaintiff's character, even when followed by a subsequent refusal to deal, serve as the basis for inferring concerted activity, absent other evidence of an understanding between the alleged conspirators. See *Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 103 S.Ct. 362 (1982).

In the instant case, although it is undisputed that the principal of PBA did send a letter to the CAB critical of Century, there is no evidence suggesting that this was anything more than the unilateral act of PBA, which is not a party to this action. Moreover, that correspondence was written more than a year before American commenced Flight 841. (Cirami Affidavit, par. 12).

As to American's considerations of PBA's likely reaction if it decreased PBA's space allocation in favor of Century, American has admitted that it did not wish to risk the loss of its major customer on the flight. (Shipman Affidavit, par. 20). This admission, however, does not point inevitably in the direction of a

conspiracy, rather it supports equally the innocent inference that American was engaged in exercising reasonable and independent business judgment for its own best interests in a competitive market. Finally, the meetings referred to between American and PBA, (Horowitz Affirmation, par. 9) indicate nothing more sinister than that PBA complained about American's rates and service. There is no reference to the exclusion of Century, or any other competitor for that matter. Indeed, it is doubtful whether a few such meetings over the course of a decade could even be viewed as "close relations" between the two companies.

Furthermore, Century has failed to establish that the space allocation system adopted by American had an illegal purpose or effect.

In its supporting memorandum, Century seeks to establish a violation of §1 on the basis of two distinct theories. First, it invokes the "essential facility" doctrine, by arguing that American's allocation was illegal "given the utter domination in the relevant market of the southbound New York to San Juan air freight traffic." (Plaintiff's Memorandum at 2). Second, a fair reading of plaintiff's papers indicates that it also seeks to urge a §1 violation on the grounds that American and PBA engaged in an illegal group boycott. *Id.*

The "essential facility" doctrine has four elements: (1) existence of a facility whose use is essential to entry into the relevant market; (2) a facility that for all practical purposes cannot be duplicated; (3) access to the facility could be made to the party seeking entry without interfering with its competitor's use of

the facility; (4) an agreement between the owner of the facility and the potential entrant's competitor which prevents and equitable sharing of the faclity. See *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

It is true that the allocation system adopted by American did prevent an equitable sharing of the space onboard Flight 841, because the reserved space was frozen for all time after the initial allocation was made in 1971. However, Century has not established nor can it do so, that access to Flight 841 was essential for entry into the relevant market or that the service provided by American could not be duplicated.

Each of these elements of the "essential facility" doctrine depends upon an appropriate definition of the relevant market. Century contends, but the evidence does not support, that the relevant market is a very narrow one: direct, regularly scheduled, nightly, all-freight, air carriage of goods between New York City and San Juan, Purerto Rico. This definition, in effect, defines the relevant market as American's Flight 841. However, in defining what is the relevant market, this Court must consider, based upon the facts disclosed in the record, what services or facilities are "reasonably interchangeable by consumers for the same purposes." *United States v. DuPont (Cellophane)*, 351 U.S. 377, 395 (1955).

This Court finds that the relevant market here extended at least to all air carriage of goods between New York and any airport in Puerto Rico. The record indicates that in addition to charter service, a variety of regularly scheduled flights were available. In par-

ticular, it is undisputed that at least two direct flights, Eastern Airlines passenger/freight combination Flight 929 and American's passenger/freight combination Flight 697 left about the same time as Flight 841. (Cirami Reply Affidavit, par's 21-22; Shipman Affidavit, Ex. A). In addition, throughout the time period covering the dispute, several early morning, afternoon and early evening flights were available, as were indirect flights via Miami and Atlanta. (Shipman Affidavit, Ex. A).

This Court rejects, as unreasonable, Century's contention the combination flights should be excluded from the relevant market, because the "LD-3" type containers used on them were only one-third the size of the "A" type containers used on Flight 841, and similarly finds that the alleged "inconvenience" of the early morning, early evening and indirect flights is insignificant in determining the relevant market.

All of the aforementioned flights are reasonably interchangeable with Flight 841, within the context of the shipment of goods by air between New York and Puerto Rico. Indeed, given the flexibility afforded by trucking, the relevant market might be much larger, encompassing air transportation of goods to Puerto Rico from other airports in the mid-Atlantic region near enough to New York to be reached by motor truck without passing through the congested highways which serve New York City.

Century's second argument in support of its assertion of a §1 violation is that American and PBA engaged in an unlawful boycott. This suggests a simple vertical restraint, and as such must by analyzed under a rule of reason. See *Oreck Corp. v. Whirlpool*

Corp., supra at 131. This is not a situation where it has been alleged that a group of plaintiff's competitors have conspired with several suppliers of a good or service to exclude the plaintiff. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959). For Century to show that the restraint was unreasonable, this Court must be presented with evidence of

> "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Chicago Board of Trade v. United States*, 246 U.S. 231. 238 (1918).

Century has offered no evidence whatsoever regarding harm to the air freight forwarding business as a result of American's space allocation system, nor has it adduced evidence concerning the history and conditions in the relevant sector of that business.

It is, of course, true that a motion for summary judgment may not be granted to defendant herein unless, after resolving all of the ambiguities and drawing all of the inferences in favor of the party against whom summary judgment is sought, that there remain no material facts in dispute. The burden "is on the moving party to establish that no relevant facts are in dispute." *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 444 (2d Cir. 1980). This Court also observes that ordinarily summary judgment is not entered against a party until that par-

ty has had an opportunity to engage in discovery. See *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 109-10 (2d Cir. 1975). However, in the instant case, plaintiff, who also seeks summary judgment, has alleged that the facts set forth in its motion establish American's liability, and that any further discovery would constitute a "sheer waste." Defendant, under these circumstances, need not be burdened with a round of discovery that plaintiff itself concedes would be wasteful. See *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 105 (2d Cir. 1981).

Defendant has demonstrated that the facts upon which Century has relied to establish allegations of a §1 violation are not susceptible of the interpretation plaintiff sought to give them: insufficient facts have been adduced to establish a conspiracy between American and PBA; the "relevant market" definition proffered by Century is inherently unrealistic and unreasonable; the evidence of an illegal boycott is utterly lacking. This failure of proof on the part of plaintiff, coupled with plaintiff's disclaimer of any need for further discovery, justifies entry of summary judgment against it. As the Court of Appeals noted in *Modern Home Institute, supra*, once the defendant has shown "'that the facts upon which [plaintiff] relied to support [its] allegation were not susceptible of the interpretation [it] sought to give them' [plaintiff is] obligated by Rule 56(e), F.R.Civ.P., to offer evidence supporting the inference urged by [it] or else face summary judgment dismissing [its] complaint," 513 F.2d at 109, *quoting from First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

In addition, the record indicates that American has made an affirmative showing, and this Court finds, that: (1) its failure to accord Century reserved air space was an independent business decision (Shipman Affidavit, Par. 25); (2) that it was unaware at the time of PBA's prior communication with the CAB about Century's license, and that PBA never told any officer or employee of American not to deal with Century (Shipman Affidavit, par. 25); (3) that the relevant market in the instant action, as this Court has found previously, consisted at the very least of all air carriage of goods between New York and Puerto Rico (Shipman Affidavit, par. 23 and Ex. A); (4) that American could not have granted Century reserved air space without the loss of PBA's business (shipman Affidaivt, par. 19); (5) that this loss would have jeopardized the continued existence of Flight 841, in light of the high volume of freight shipped by PBA on the return flight, and advantage not offered by others (Shipman Affidavit, par. 24); and (6) that competition was not harmed by American's failure to accord Century reserved air space at the expense of others (Shipman Affidavit, Ex. A).

Century's motion for summary judgment with respect to its claim under §1 of the Sherman Act is denied.

American's motion for summary judgment against Century on the §1 claim is granted.

Claim Under §2 of the Sherman Act

Century also contends that American's conduct in denying it reserved main deck container positions on

Flight 841 constitutes attempted monopolization as defined by §2 of the Sherman Act. In order to prevail on this claim, Century must establish that American (1) had monopoly power in the relevant market; and (2) willfully maintained that monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Century has failed to meet its burden in establishing that American had monopoly power in the relevant market, because it has failed to present credible evidence that the relevant market is defined as it claims. As stated previously, this Court finds that the relevant market is at the least inclusive of all air carriage of goods between New York and Puerto Rico. Therefore, Century's assertion that American has a 75% share of the market, is, if the two late night combination passenger/freight flights of American and Eastern Airlines are taken into account (Cirami Reply Affidavit, par. 21), unsupportable. This Court makes no specific finding as to the percentage of the relevant market that was accounted for by American's Flight 841, however, the evidence adduced by American (Shipman Affidavit, Ex.A), as to the number of alternative flights, scheduled and charter, available to air freight forwarders indicates clearly that American did not have the "power to control prices or exclude competition." *United States v. DuPont, supra* at 391.

Century has also failed to present any credible evidence demonstrating that wilfully attempted to maintain any market power it had in the carriage of goods by air between New York and San Juan. The only evidence offered by Century is that American failed to provide Century with reserved main deck container positions on Flight 841. It is indeed dif-

ficult to fathom how the identity of the customers on this flight could help to maintain American's position in the market or prevent entry and competition from other scheduled airlines or charted flights. Nor can Century show that American somehow used its position in the market to eliminate it competitors. The undisputed evidence, (Shipman Affidavit, Ex. A), does not show any noticeable decline in the number of flights, nor the number of direct air carriers offering flights to Puerto Rico from New York during the period of this dispute. Moreover, by its own admission (Cirami Affidavit, par. 12), Century concedes that the reason there was no other late night all freight flight, between New York and San Juan at the time, was that demand, especially on return flight, was insufficient to support a rival service.

Defendant has established that the facts presented by Century cannot support an actionable claim under §2, and Century has not adduced any evidence which would militate against entry of summary judgment against it. As noted earlier, defendant has established affirmatively that: (1) the relevant market is at the very least inclusive of all air carriage of goods between New York and Puerto Rico; (2) American lacked the power to control prices or exclude competition in this market; (3) American did not further its position in this market wrongfully by failing to allocate reserved air space to Century; (4) American's conduct did not demonstrably reduce competition in the relevant market; and (5) that Flight 841 was the only nightly, all freight flight was attributable solely to inadequate market demand, especially on the return flight.

Accordingly, Century's motion for partial summary judgment with respect to its §2 claim is denied and the motion of defendant is granted.

Conclusion

In summary, plaintiff's motion for partial summary judgment is denied in all respects. Defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6), F.R.Civ.P., with respect to the claim under §404 of the Federal Aviation Act is granted. Defendant's motion for summary judgment against plaintiff as to the claims under Sections 1 and 2 of the Sherman Act, pursuant to Rule 56, F.R.Civ.P., is granted.

The Clerk of the Court shall enter final judgment that all relief is denied. See Rule 58 F.R.Civ.P.

So Ordered.

Dated: New York, New York
January 5, 1984

s/Charles L. Brieant
Charles L. Brieant
U.S.D.J.

FOOTNOTES

1. In response to American's motion for dismissal on grounds of primary jurisdiction, Century stipulated to referral to the CAB of so much of the action as was within its jurisdiction, and a stay of all other proceedings in this Court. On December 14, 1979, the CAB's Bureau of Consumer Protection instituted enforcement proceedings alleging that American's allocation practices on Flight 841 violated §404(b) of the Federal Aviation Act. American denied any violation. Thereafter, on August 18, 1980, American and the CAB reached agreement, prior to any hearing, on a consent order disposing of the Bureau's complaint, providing for the payment by American of $50,000 in civil penalties, and establishing a new allocation system, subject to annual reassessment, whereby American guaranteed that one "A" type container would be available on Flight 841 to any shipper which regularly used the equivalent of such a container on the northbound Flight 840. The settlement expressly excluded any consideration of anti-trust claims against American, nor did it, quite properly, address itself to the availability of private damage actions under §404. Century opposed the settlement, but its objections were rejected by the CAB and the Court of Appeals, *Century Air Freight Inc. v. Civil Aeronautics Board*, 679 F.2d 261 (D.C. Cir. 1982). Century's petition for certiorari was denied by the United States Supreme Court on October 18, 1982, 103 S.Ct. 256 (1982). On April 25, 1983, Century requested that this action be removed from our Suspense Docket and reactivated.

APPENDIX 5—LETTER OF REUBEN B. ROBERTSON TO AMERICAN'S RICHARD FAHY, JR. ESQ. ANNOUNCING BUREAU'S INTENTION TO INSTITUTE ENFORCEMENT PROCEEDING; JUNE 22, 1979

[Letterhead of Civil Aeronautics Board, Washington, D.C.]

June 22, 1979

Richard Fahy, Jr., Esquire
American Airlines, Inc.
633 Third Avenue
New York, New York 10017

Re: *Century Air Freight, Inc. v. American Airlines, Inc.*, No. 77 Civ. 2195 (CLB) (S.D.N.Y.)

Dear Mr. Fahy:

On July 27, 1977, this case was referred to the Civil Aeronautics Board so that the Board might assist the U.S. District Court for the Southern District of New York in resolving plaintiff's complaint. As you know, our inquiry into this case has unavoidably been protracted because of the many changes enacted since the summer of 1977 in the law governing the duties and obligations of carriers engaged in the transportation of air freight. We are now writing to you and Mr. Horowitz to advise you of the results of the review which has been conducted by the Bureau of Consumer Protection.

BACKGROUND

This referral arose from a civil action in which Century Air Freight, Inc., a small air freight forwarder, alleged that American Airlines, Inc. had improperly denied it access to American's reserved all-cargo service between New York City and San Juan, Puerto Rico. Century contended that its exclusion had been the result of a standing priority allocation given by American to Profit-by-Air, Inc., one of Century's competitors. In its Federal Court complaint, Century asserted that the agreement to provide this priority constituted an unlawful restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, as well as unjust discrimination in air transportation prohibited by Section 404(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §1374(b). It alleged that these activities had caued it $7.5 million of injury and sought treble damages in the sum of $22.5 million. In addition, Century asked for injunctive relief to ensure that American discontinued this practice.

As discussed in our letter to the Court of October 20, 1977, the Board determined that exercising its primary jurisdiction over Century's complaint would be in the public interest for several reasons. First, the Board's expertise in aviation matters would be quite helpful in resolving the complaint. See, *e.g., Far East Conference v. United States,* issued against American, a remedy whose imposition would best be considered by the Board as the federal agency charged with regulating the air transportation industry. See, *e.g., Carnation Co. v. Pacific Con-*

ference, 383 U.S. 213 at 221 (1966). Finally, the best resolution of the issues presented in Century's complaint would take into account the public welfare and not just the interests of the private parties. Together, these factors suggested to the Board that referral would be the most appropriate procedure to follow.

With the consent of both parties, the Bureau of Enforcement (now the Bureau of Consumer Protection) wrote to the District Court and suggested that the complaint be referred to it.[1] We stated that the complaint would become the subject of a thorough Bureau investigation and that, depending upon its outcome, the complaint would either be dismissed or made the subject of an administrative enforcement proceeding or a Federal Court action. Accordingly, on October 27, 1977, Judge Brieant ordered the matter formally referred to the Board. He also ordered all further judicial proceedings stayed pending the outcome of our investigation.

In the year that followed, information requests were presented to both parties, meetings among counsel were held, plaintiff's principals provided sworn testimony during a session of informal depositions, and several of defendant's employees and officers submitted to formal investigatory interviews. During that time, the Board carefully monitored the developments in the law in this area brought about by amendments to the Federal Aviation Act made in Public

1. This step was concurred in by the Board's General Counsel's office.

Law 95-163 (November 9, 1977); the Airline Deregulation Act of 1978, Public Law 95-504; and general trends of deregulation. We also awaited the outcome of the initial decision in the *Priority Reserved Air Freight Rate Investigation ("PRAFRI")*, Docket 26838, to determine its impact on the applicable law.

FACTS

There is little, if any, disagreement about the facts material to Century's complaint. American commenced its freighter service in approximately March of 1971, an operation it obtained through its acquisition of Trans Caribbean Airways. At the time of the acquisition, TCA offered only service on Boeing 727's. Shortly thereafter, American expanded TCA's operations and instituted service on Boeing 707's, the service it provides today.

Upon expanding its operations, American offered standing priorities to forwarders who would commit themselves to regularly using one or more full cargo positions on its planes.[2] Once a position was allocated to a forwarder, it was committed indefinitely. Originally, seven of the twelve main deck positions were allocated to Profit-By-Air, two were reserved for Shulman Air Freight, and one was awarded to Emery Air Freight. In the latter part of 1971, both Shulman and Profit-By-Air increased their allocations by one

2. American did not choose to offer belly space or the nose position to forwarders on a confirmed basis. I assume the reasons for not doing so are that shipments in belly space must be broken out of their containers for shipment and the nose position is of an odd size. These factors made the belly and nose positions unattractive, and so they were kept for use on a daily basis only.

position. There were no other changes in position allocations until August, 1978, when Shulman went out of business. At that time, Shulman's three positions were divided between Air Express International, Burlington Northern, and Bor-Air.[3]

Throughout most of this time, Century repeatedly sought the allocation of two main deck positions. Letters exchanged between Century and American provide written documentation for the fact that Century made requests on the following dates:

1972	1973	1974
Oct. 5	Jan. 15	Apr. 1
Oct. 26	June 22	Sept. 16
Nov. 9	Nov. 12	
Dec. 18		

In addition, Century has provided the Bureau with an operations diary confirming that it made oral requests on the following dates:

1975		
Apr. 21	July 9	July 15
April 23	July 10	Oct. 10
July 8	July 14	

3. Although only three positions were freed by Shulman's demise, seven different forwarders, seeking a total of 11 positions, requested to take Shulman's place.

1976

Apr. 6
Apr. 7
Apr. 8
Apr. 9
Apr. 12
Apr. 13
Apr. 14
Apr. 16
Apr. 19
Apr. 20
Apr. 21
Apr. 26
Apr. 27
Apr. 28
Apr. 29
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May 4
May 6
May 7
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Oct. 7
Oct. 8
Oct. 11
Oct. 12
Oct. 13
Oct. 14
Oct. 15
Oct. 18
Oct. 20
Oct. 21
Oct. 22
Oct. 17

1977

Jan. 12
Jan. 31

Sometime during the prosecution of its complaint, Century was provided with some space on American's freighter, although I have been informed that its shipments are often broken out in the plane's belly space. American has not, however, provided Century with all the space it requested, nor has American ever required other forwarders to relinquish some of their space in favor of Century.

American's practices clearly prevented Century from firmly establishing itself in the southbound market. To be competitive, a forwarder must be able to offer overnight service during prime time. Yet, throughout most of the period at issue here, there were no alternatives available to Century comparable to American's service. Using combination service on passenger planes was not acceptable for several reasons. First, the smaller containers offered on combination service would substantially increase a forwarder's costs, since the freight in this market is not dense and is often of an unusual size.[4] Second, the availability of container space on combination flgihts is subject to the needs of transporting passenger baggage. Thus, it is impossible for a forwarder to guarantee overnight delivery to its shippers, a service demanded by many of the large shippers in this market. Third, a forwarder must be able to time delivery to his shippers' specifications.[5] However, combination service is timed to passenger schedules.

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4. This fact, originally stated to the Bureau by Century, was corroborated in our interviews with American's personnel held in June of 1978.

5. Usually, this calls for late evening departures, a fact attested to by the scheduling of American's freighter.

In addition, although other carriers have periodically offered freighter service in this market, no other carrier matches American's frequency, service, or dependability.[6] For these reasons, American's long-standing exclusion of Century and its restriction on the amount of space ultimately provided were injurious to Century's development of a southbound operation.

LEGAL DISCUSSION

Prior to the passage of P.L. 95-163 and the development of new policies during deregulation, there was no question that American's standing preference in favor of Profit-By-Air and the resulting exclusion of Century constituted unlawful discrimination under Section 404(b) of the Federal Aviation Act. Under prior law, the proscription against unjust discrimination:

> precludes different treatment of like traffic for like and contemporaneous service under substantially similar circumstances and conditions. (Citation omitted.) Such discrimination may result from the charging of different rates to different shippers or passengers afforded the same service . . . or from the offering of specific services to only a select patron or group of patrons (citation omitted). In either situation, the result is that the carrier is giving preferential treatment to one person or group of persons to the prejudice of another and contrary to the requirement that all those who seek the service of a carrier must be

6. The same is true of the other carriers now in the market. Airlift's service is often chartered to other destinations without advance warning, and Flying Tiger's new operation is limited to Saturday only.

> treated alike. *Transcontinental Bus System, Inc. v. Civil Aeronautics Board*, 383 F.2d 466 at 481-82 (5 Cir. 1967); cert. denied, 390 U.S. 920 (1968).

Guided by these principles, the Board explicitly found that an agreement giving Emery Air Freight a standing priority over other forwarders in having its cargo boarded on commuter carriers was unduly preferential and refused to approve it under Section 412. *Emery Air Freight and Air Midwest, Inc.*, et al., Order 73-4-8. pp. 1, 2, 6. Thus, prior to the enactment of the P.L. 95-163, American's practice clearly violated the probitions of Section 404(b).

After reviewing several Board decisions and regulations issued since that time, the Bureau has concluded that the requirements of equal treatment enunciated in *Transcontinental Bus System, Inc., supra*, are largely unchanged with regard to boarding preferences and that American's practice remains unlawful. In ER-1080 (November 9, 1978), the Board began reviewing the obligations of freight carriers with a view toward amending them to conform to the new law. After a full rule-making proceeding, the Board decided that it would be in the public interest to utilize its power under Section 416(a) to exempt carriers from several statutory obligations, such as the duty to carry upon reasonable request arising under Section 404(a). However, the Board explicitly provided that this exemption did not alter obligations arising under Section 404(b), stating that:

> This exemption, however, does not relieve the carriers of their service obligations as common carriers, and does not apply to a carrier's duty to refrain from providing preferential treatment to particular companies

> or persons. Carriers having certificates under Section 401 or 418 remain, by definition, common carriers. ER-1080, p. 12.

Accordingly, although the Board codified sweeping changes in carriers' duties in Part 291 of its regulations, it has never exempted carriers from the requirements of Section 404(b). See, *e.g.*, 14 C.F.R. §§291.30-35.[7]

The Board has shown that it will continue to adhere to the longstanding interpretation of Section 404(b) in cases involving standing service preferences. In the matter of the application of *Trans-Mediterranean Airways, S.A.L.*, Docket 30255, the Board specifically found a contract under which TMA had agreed to give the freight of one particular shipper a standing delivery priority over other freight to be unlawful. In its own words:

> The Board has rejected similar priority arrangements in interstate air transportation and we see no persuasive reason for adopting a different policy.... Order 78-5-67, p. 12.[8]

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7. Nothing in the Board's Proposed Policy Satement on Price Discrimination, PSDR-58, which specifically concerns price discrimination and not service preferences, excuses American's discriminatory actions either. In fact, the proposed statement provides further support for finding these practices to be unlawful since American's discrimination caused Century severe financial injury which the force of free entry did not dilute over a substantial period of time. See, 14 C.F.R. §399.34(b) (proposed).

8. *See also*, the matter of the application for a foreign air carrier permit submitted by *P.T. Merpati Nusantara Airlines (Air Bali)*, Docket 30826, in which the Board found that a proposal to offer one-way charters on the basis of nationality was discriminatory and violated Section 404(b), citing *Transcontinental Bus System* with approval. Order 78-6-217, p. 3.

On the basis of this precedent, the Bureau has concluded that American's treatment of Century which resulted from a standing preference in favor of Profit-By-Air is unjustly discriminatory and must be discontinued.[9]

We have also concluded, on the basis of information presently available, that there are reasonable grounds to believe that American's practice constituted a violation of Section 1 of the Sherman Act. Specifically, we find that it is inconsistent with the "essential facility" doctrine perhaps best enunciated in *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). The relevant market at issue here is confirmed air freight traveling from New York City to San Juan, Puerto Rico on regularly scheduled cargo service. American's service constituted a facility essential to successful operations in this market. Since, as a practical matter, air freight forwarders are unlikely to be able to duplicate these services, they should be allocated on fair terms. Therefore, in foreclosing the use of American's services, both American and Profit-By-Air may have violated the antitrust laws. *Hecht, supra*, 570 F. 2d at 992; *see also, Otter Tail Power Co. v. United States*, 410 U.S. 366 (1972). By implication,

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9. As you know, the Bureau was of the opinion that the outcome of *PRAFRI* might affect our interpretation of Section 404(b). In *PRAFRI*, the questions of whether the rates charged for priority freight were discriminatory and whether the Board had jurisdiction to make such a determination were raised. In his initial decision, presiding Judge Yoder found that priority rates were unlawfully discriminatory and that the Board still had jurisdiction over such matters even in light of cargo deregulation. In reaching his decision, Judge Yoder relied on the interpretation of Section 404(b) advanced in *Transcontinental Bus System, Inc., supra*, showing that it is still current. I.D. at 57-58. Thus, based on the long-awaited outcome of *PRAFRI*, this interpretation of carriers' obligations is still valid.

any such violations would also constitute unfair methods of trade within the meaning of Section 411 of the Federal Aviation Act. See, *Federal Trade Commission v. Cement Institute,* 333 U.S. 683 (1948).

CONCLUSION

For the reasons stated above, the Bureau has concluded that American violated Section 404(b) of the Federal Aviation Act in excluding Century from its New York City-San Juan freighter service and by continuing to restrict the availability of this service as a result of preferences given other forwarders. These actions not only injured Century's business, but also caused great harm to the general public. American prevented a small forwarder from offering new, innovative service to the public in competition with the incumbent. Such a result is directly contrary to the aims of deregulation and current Board policies.

By July 20, 1979, the Bureau will determine what further course of action should be taken here.[10] On the basis of the evidence presently available, we have concluded that American must begin allocating space on its freighter in a different manner. If you wish to dispute this conclusion by drawing additional evidence or legal precedent to our attention, please contact Robert C. Seldon, the Bureau's attorney responsible for the case's development, prior to the 20th.

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10. We have already decided to take no action of our own in response to Century's antitrust claim. Our reasons for doing so are stated more fully in our letter to Century's counsel, a copy of which is attached here.

I must advise you that unless we are presented with a contrary view of the facts or applicable precedent, the Bureau is prepared to institute an administrative proceeding to ensure that, in the future, American will allocate space on its freighter in a nondiscriminatory manner. In addition, if American's practices were found to be unlawful, American could also be subject to civil penalty liability under Section 901(a) of the Act. We would prefer to resolve these and other ancillary matters without resort to litigation. If American is amenable to such a solution, I suggest you discuss this matter as well with Mr. Seldon prior to July 20th. In particular, I believe it would be fruitful to discuss future practices in the market as well as remedies for American's past activities.

Very truly yours,
s/ Reuben B. Robertson
Reuben B. Robertson
Director
Bureau of Consumer Protection

Attachment
cc: Milton Horowitz, Esq.